

International Criminal Court and the Rome Statute: 2010 Review Conference

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Summary

ICC Review Conference and U.S. Engagement

The International Criminal Court (ICC, or Court) was established in 2002 as the first permanent court to prosecute war crimes, crimes against humanity, and genocide (together, “ICC crimes”). Pursuant to a provision in the Statute of the International Criminal Court (“Rome Statute” or “Statute”), the States Parties to the Rome Statute agreed to review the Court’s activities seven years after its establishment. In compliance with this provision, the States Parties convened a Review Conference in Kampala, Uganda, May 31–June 11, 2010.

After declining to officially participate in the activities of the ICC or in the sessions of the Rome Statute’s Assembly of States Parties (ASP) since the Court was established in 2002, the United States shifted its stance and began attending ASP meetings as an observer in November 2009, signaling a new policy of engagement with the ICC. At the Review Conference, the United States participated fully as an observer.

Issues Considered at the 2010 ICC Review Conference

Proposals in the Review Conference’s agenda had broad possible ramifications for U.S. interests, and provided an opportunity for the United States to assess its policy toward the Court. Review Conference participants considered adding the crime of aggression to the ICC’s jurisdiction, which would allow prosecution of state officials for using armed force against another state. The United States opposed this proposal for a number of reasons, including the possibility that U.S. officials might be prosecuted for their decisions. These concerns parallel the U.S. concerns over the possible prosecution of U.S. officials and servicemembers for the other ICC crimes. The question of ICC aggression jurisdiction was the most contentious for the Review Conference. States Parties argued over two central issues for activation of ICC aggression jurisdiction:

- whether both aggressor and victim state consent would be necessary to grant ICC jurisdiction over an instance of alleged criminal aggression; and
- the extent to which the U.N. Security Council should control the Court’s exercise of aggression jurisdiction.

The States Parties adopted new jurisdiction provisions after several compromises, including delayed implementation and restricted application of the Court’s aggression jurisdiction, and allowing states to opt out of ICC aggression jurisdiction.

The Review Conference agenda also included a number of discussions assessing the effect of the ICC on international criminal justice, especially with regard to crime victims and affected communities, and States Parties’ cooperation with the ICC. During the Conference, the U.S. delegation demonstrated its new policy of engagement, pledging in-kind support for existing ICC cases and investigations, and for the development of States Parties’ judicial-system capacity to prosecute ICC crimes. U.S. officials have since expressed support for the ICC, stating that it is now the global focal point for international criminal justice.

Possible Congressional Actions Concerning the New U.S.-ICC Policy

U.S. officials have asserted that this new policy of engagement with the ICC complies with U.S. law concerning the U.S.-ICC relationship, including the American Servicemembers’ Protection Act of 2002 (ASPA), which was broadly intended to limit U.S. cooperation with and prohibit U.S.

funding for the Court. In light of existing law and new ICC engagement, Congress may opt to take certain actions, including

- conducting hearings to better inform Members of Congress about
 - the possibility of the United States becoming party to the Rome Statute in the wake of the changes to the Statute made at Kampala;
 - the implications for U.S. interests, especially U.S.-servicemember security, of the adoption of ICC aggression jurisdiction;
 - the new U.S.-ICC relationship; and
 - executive branch compliance with the ASPA and other legislation;
- adding executive-branch reporting requirements on U.S. cooperation with the ICC and its basis in U.S. law, as well as developments in ICC practice related to changes in the Rome Statute adopted by the Review Conference; and
- amending existing legislation to direct the U.S.-ICC relationship, including dealing with ICC aggression jurisdiction and other changes to the Rome Statute.

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Background

U.S. Policy Toward the ICC¹

The International Criminal Court (“ICC” or “Court”) is a permanent international court that currently has jurisdiction to prosecute individuals for war crimes, crimes against humanity, and genocide (together, “ICC crimes”). Cases may be referred to the Court by States Parties or by the U.N. Security Council, and the ICC prosecutor may on his own initiative request authorization to investigate possible ICC crimes. The ICC was created upon entry into force of the Statute of the International Criminal Court (“Rome Statute” or “Statute”), on July 1, 2002. One hundred and fourteen countries are States Parties to the Statute.² The United States, however, is not a party to the Statute.

The United States was an initial supporter of the creation of the ICC and played a major role at the international conference that negotiated and finalized the Rome Statute in 1998. President William J. Clinton signed the Rome Statute in 2000 but stated that he would not transmit it to the Senate requesting its advice and consent due to a number of U.S. concerns, primarily the potential for the ICC to assert jurisdiction over U.S. officials and members of the U.S. Armed Forces, even if the United States was not a Party to the Rome Statute. In May 2002, President George W. Bush notified the United Nations that the United States did not intend to become Party to the Rome Statute. The United States also concluded bilateral immunity agreements (BIAs) with approximately 100 countries. These BIAs were intended to fall within the provisions of Article 98 of the Statute, which exempts a state from surrendering individuals to the ICC if such actions would violate the international treaty obligations of that state.³

Congress passed legislation restricting U.S. cooperation with the ICC. On August 2, 2002, President George W. Bush signed the American Servicemembers’ Protection Act of 2002 (ASPA).⁴ It generally prohibits U.S. government cooperation with the ICC by

- restricting the use of appropriated funds to assist the ICC;
- restricting U.S. participation in certain U.N. peacekeeping operations due to possible ICC prosecution; and
- authorizing the President to free members of the U.S. Armed Forces and other individuals detained or imprisoned by or on behalf of the ICC.

Section 2015 of the act creates an exception from the prohibition on assisting the ICC in order to bring to justice foreign nationals accused of ICC crimes.⁵

¹ For more information on the ICC and historic U.S. policy toward the Court, see CRS Report R41116, *The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy*, by Emily C. Barbour and Matthew C. Weed; CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer K. Elsea; and CRS Report RL31495, *U.S. Policy Regarding the International Criminal Court (ICC)*, by Jennifer K. Elsea.

² The Statute has 114 States Parties as of January 20, 2011. U.N. Treaty Collection, *Multilateral Treaties Deposited With the Secretary-General*, Ch. XVIII (Penal Matters), entry 10, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

³ For a list of BIAs, see Georgetown Law Library, *International Criminal Court — Article 98 Agreements Research Guide*, http://www.ll.georgetown.edu/guides/article_98.cfm.

⁴ Title II of P.L. 107-206; 22 U.S.C. §§ 7421–7433.

⁵ 22 U.S.C. § 7433.

The U.S. stance toward the Court seemed to soften during President George W. Bush's second term, as the United States began to treat the ICC as a potentially effective tool for international criminal justice. In 2008, for instance, the United States did not prevent adoption by veto of a U.N. Security Council resolution referring a war crimes case to the ICC prosecutor for investigation into atrocities in the Darfur region of Sudan.⁶ Under the Obama Administration, U.S. officials have been generally supportive of the ICC, while cautioning that the United States maintains its concerns about the threat the Court poses to U.S. officials and members of the Armed Forces, and that U.S. ratification of the Statute is not currently an option. In November 2009, the United States for the first time attended a meeting of the Assembly of States Parties (ASP) of the International Criminal Court as an observer. Upon announcement of U.S. participation, Stephen Rapp, U.S. ambassador-at-large for war crimes issues, stated that "[the U.S.] government has now made the decision that Americans will return to engagement with the ICC."⁷ At the November ASP meeting, Ambassador Rapp stated that the United States would also participate in the ICC Review Conference scheduled to take place in 2010.⁸

ICC Review Conference Planning and Agenda

Paragraph 1 of Article 123 of the Rome Statute requires the convening of a review conference:

Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5 [the crime of genocide; crimes against humanity; war crimes; and the crime of aggression]. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

Soon after the creation of the ICC, the ASP created a Working Group of the Review Conference to evaluate various issues, amendments, and potential agenda items for the required review conference. Several years of the Working Group's meetings and work provided guidance for the ASP's decision making concerning the Review Conference's agenda and the content of the proposed resolutions and other Review Conference agenda items. On November 21, 2008, the ASP adopted a resolution approving an application from the government of Uganda to hold the Conference in Uganda's capital, Kampala.⁹ In two resolutions adopted November 26, 2009, and March 25, 2010, respectively, the ASP resolved to convene the Review Conference and determined the primary elements of the Review Conference's agenda.¹⁰

The agenda for the Review Conference included a number of issues and proposals slated for action by the States Parties, including making amendments to the Rome Statute. The central agenda item was consideration of new provisions to define and activate ICC jurisdiction over the crime of aggression, which involves actions of a state official or leader that cause the use of armed force against another state. The Review Conference would also consider a proposal to remove Article 124 from the Statute, which allowed a new State Party to exempt itself from ICC

⁶ U.N. Security Council Resolution 1593 (2005), March 31, 2005.

⁷ As reported. BBC News, "US to resume engagement with ICC," November 16, 2009, <http://news.bbc.co.uk/2/hi/8363282.stm>.

⁸ As reported. Colum Lynch, "US to Attend, but Not Join, ICC Conference," *Washington Post*, November 17, 2009, p. A20.

⁹ Resolution ICC-ASP/7/Res.2, available at <http://www.icc-cpi.int/Menus/ASP/Resolutions/Sessions/2008+-+7th+Session.htm>.

¹⁰ Resolution ICC-ASP/8/Res.6 and Resolution ICC-ASP/8/Res.9, available at <http://www.icc-cpi.int/Menus/ASP/Resolutions/Sessions/2009+-+8th+Session.htm>.

jurisdiction for the first seven years after becoming party to the Statute. In addition, there was a proposal to include within the definition of war crimes the use of certain poisonous or asphyxiating substances as well as certain types of bullets in non-international conflicts.¹¹ Finally, the agenda called for the Conference to convene discussions to take stock of the work of the ICC to date and its effects on international justice and other issues. These so-called “stocktaking” exercises included sessions on

- the obligations of States Parties to cooperate with the ICC and each other to effect international criminal justice;
- the efforts to improve States Parties’ national judicial systems’ respective capacity to prosecute individuals for war crimes, crimes against humanity, and genocide under the principle of “complementarity”;¹²
- the effect of the Rome Statute system on victims of and communities affected by crimes under the ICC’s jurisdiction; and
- the relationship between engaging in peace processes and pursuing international criminal justice.

Crime of Aggression

The central issue considered by the Review Conference was the proposed adoption of the crime of aggression into the jurisdiction of the Court. This section reviews the primary issues and points of contention concerning the ICC’s proposed aggression jurisdiction. It includes

- an overview of different states’ and other stakeholders’ positions on the Court’s aggression jurisdiction;
- a discussion of the proposed and adopted definition of the crime of aggression and the issues surrounding such definition; and
- a discussion of the provisions that set out the Court’s jurisdiction over aggression, including the provisions as proposed, the main issues of contention for the Review Conference, and the jurisdictional provisions as they were ultimately adopted by the Conference.

During negotiations to finalize the Rome Statute in 1998, some countries’ delegations to the conference wished to include aggression as one of the crimes under the ICC’s jurisdiction in order to empower the ICC to end impunity for waging aggressive war in violation of international law generally and the U.N. Charter in particular. The participants could not agree on the definition and jurisdiction provisions of aggression, however, and thus included aggression as a crime included in the Rome Statute but not yet defined or activated. Article 5, paragraph 1 of the Rome Statute, lists the international crimes within the Court’s jurisdiction: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Paragraph 2 of Article 5 states that the Court will exercise jurisdiction over aggression after it has adopted a provision defining the crime and setting conditions for the exercise of jurisdiction over the crime. Article 123 states that such an addition to the Rome Statute must be considered and adopted at a Review Conference.

¹¹ These weapons were already included in the definition of war crimes as applied to international conflicts.

¹² For a description of the principle of complementarity, see “Understandings Concerning Complementarity as Applied to Aggression” below.

In anticipation of the Review Conference mandated by the Rome Statute, the ASP created a Special Working Group on the Crime of Aggression (SWG) in 2002. The SWG was tasked with creating working proposals for amendments to the Rome Statute defining the crime of aggression and the Court's exercise of jurisdiction over the crime. The context within which the SWG undertook its work presented a number of challenges. First, the Court's three operative crimes (war crimes, crimes against humanity, and genocide) had been prosecuted in numerous cases before ad hoc international criminal tribunals and national courts in the decades prior to their inclusion in the Rome Statute. Aggression jurisprudence, on the other hand, has been frozen since the late 1940s, when several German and Japanese officials were prosecuted under the crime of aggressive war. Since the advent of the Cold War, no aggression prosecutions have been undertaken. The SWG, therefore, had no clear and current international practice on which to rely with respect to defining and exercising jurisdiction over the crime of aggression when compared with the three more established crimes. Second, since the end of the Cold War, international recognition has expanded for certain uses of force, including foreign military action to stop atrocities taking place within the borders of a country. Overall, U.N.-mandated peacekeeping operations have greatly increased in number since 1991. Any consideration of prosecuting illegal uses of force is complicated by the growing acceptance of military action considered acceptable by the international community. Third, while war crimes, crimes against humanity, and genocide are *jus in bello* crimes, that is, crimes committed during an armed conflict, aggression is a *jus ad bellum* crime, involving a determination of the legality of the decision to initiate the armed conflict itself. Fitting a *jus ad bellum* crime into the established procedures and jurisdictional practice of three *jus in bello* crimes might prove difficult.

A number of observers and governments, including the United States, have voiced opinions over the perceived benefits and risks of including the crime of aggression in the ICC's jurisdiction, and the possible effect on the operation of the ICC overall. Leading up to and during the Review Conference, several States Parties, as well as the United States as observer, opposed adoption of jurisdictional provisions for aggression if consensus among States Parties could not be achieved.¹³ Any decision taken without consensus, they argued, might result in permanent discord among States Parties and reduced State Party cooperation with the Court. There was sentiment among some participants that the Review Conference would be the last opportunity to activate aggression as an ICC crime; these participants believed that consensus was less important than adopting the provisions activating the aggression crime to reduce illegal military action as soon as possible. Analysts have also argued that the addition of a new crime at this point in the ICC's development might cause the Court to be overburdened with a set of new cases when it still has not completed a trial. In addition, some argued that adopting aggression might prevent the ICC from meeting the goal of universal acceptance of its jurisdiction, as several major powers, including the United States, China, Russia, and India, already had concerns about ICC jurisdiction over the crime. Activating aggression may cause one or more of these countries to foreclose the possibility of becoming States Parties to the Rome Statute. In addition, many, including State Department Legal Adviser Harold Koh, have argued that any determination over the propriety of military action is inherently political, and that the ICC would weaken its reputation as an impartial judicial body if it embroiled itself in political disputes between parties to armed conflict.¹⁴

¹³ Vijay Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference*, Council on Foreign Relations Special Report, Apr. 2010, p. 15; Harold Hongju Koh, legal adviser, U.S. Department of State, statement at the Review Conference of the International Criminal Court, June 4, 2010, <http://www.state.gov/s/l/releases/remarks/142665.htm>.

¹⁴ Harold Hongju Koh, legal adviser, U.S. Department of State, statement at the Resumed Eighth Session of the

In addition, U.S. officials have expressed concerns about the ICC's jurisdiction over aggression that are specific to the interests of the United States. These officials have pointed to the special position that the United States occupies as the "sole global superpower," and the fact that the United States is expected to use its military more frequently than other countries because in many instances it is uniquely capable of meeting international security challenges. If the ICC gains the ability to prosecute government officials for their decisions to take military action, they have argued, U.S. decision makers would be disproportionately at risk of prosecution, possibly for political reasons. U.S. officials and some analysts have asserted that with the ICC's activation of the crime of aggression, U.S. officials charged with making national and international security decisions might hesitate to initiate military action for fear of later ICC prosecution and punishment. Also, as with the three crimes currently operative under the Rome Statute, the Department of Defense has remained concerned over the possibility that the ICC will prosecute members of the U.S. Armed Forces for carrying out military operations abroad. Ambassador Rapp has stated that if these concerns are not properly addressed prior to adoption of new aggression provisions, the chances for universal acceptance of ICC jurisdiction by all countries, a primary goal of the ICC and its supporters, will be diminished.¹⁵ Commentators have interpreted this to mean that the United States would not become party to the Rome Statute if aggression provisions are adopted that are not acceptable to the United States.¹⁶

During the Review Conference, the States Parties to the Rome Statute reached consensus on proposed amendments both to define the crime of aggression and to set out the circumstances and procedures under which the ICC may exercise jurisdiction over the crime. The following two sections evaluate the amendments as adopted in relation to arguments made and concerns expressed about such amendments, and the extent to which such concerns, especially those of the United States, were addressed by the Review Conference.

Definition of the Crime of Aggression

Over several years, the SWG developed the definition of the crime of aggression eventually proposed at the Review Conference, with the input of not only States Parties but also other stakeholders such as observer nations and relevant non-governmental organizations (NGOs). The definition of the act of aggression, which makes up part of the overall definition of the crime of aggression within the amendment, as well as a list of examples of uses of armed force constituting an act of aggression, are based on a U.N. General Assembly resolution adopted by consensus in 1974 with the general support of the United States.¹⁷ It was widely accepted among observers that the SWG had succeeded in producing consensus among States Parties for the definition as proposed prior to the Review Conference, and the amendment was adopted at the Conference without changes.

Assembly of States Parties of the International Criminal Court, Mar. 23, 2010, <http://usun.state.gov/briefing/statements/2010/139000.htm>.

¹⁵ Stephen Rapp, U.S. ambassador-at-large for war crimes issues, statement at the opening of the 2010 Review Conference of the Rome Statute of the International Criminal Court, June 1, 2010, p. 9, http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-gendeba-USA-ENG.pdf.

¹⁶ Brett Schaefer, "Trouble for the International Criminal Court," National Review Online, June 8, 2010, <http://www.nationalreview.com/articles/229906/trouble-international-criminal-court/brett-d-schaefer>.

¹⁷ A/RES/3314 (XXIX), adopted Dec. 14, 1974.

Definition as Adopted¹⁸

As mentioned above, the definition adopted by the States Parties during the Review Conference defines both the “crime of aggression” and an “act of aggression.” “Crime of aggression” is defined as

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

“Act of aggression” as contained in the definition of “crime of aggression” is defined as

the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

The definition then lists a number of acts that qualify as an act of aggression, in accordance with a list included in the 1974 U.N. General Assembly resolution. This list includes (1) military invasion or attack on another state’s territory or any occupation or annexation of another state’s territory; (2) bombardment or use of weapons against another state’s territory; (3) blockading ports; (4) attacking another state’s armed forces, including marine and air fleets; (5) use of armed forces in another state by agreement when such use violates the agreement; (6) aiding another state through use of territory to commit aggression against a third state; and (7) sending irregular forces into another state to use armed force.

Arguments and Concerns

Although States Parties and other stakeholders were generally satisfied with the definition of aggression developed by the SWG, a number of criticisms of the definition remained and were discussed prior to and during the Review Conference. Critics argued that the definition is vague and overly broad. Such perceived vagueness may be characterized as unfair to individuals whose actions might fall under the definition, because they cannot determine what actions are prohibited. Some observers have argued that the limited jurisprudence and precedent for aggression crimes increases the importance of clearly defining the crime of aggression within the Rome Statute, and that a vague definition could increase the chance that politically motivated prosecutions might take place.

Critics have offered an additional number of perceived problems with the definition:

- The definition does not adequately explain which individuals qualify as officials who may “exercise control over or direct the political or military action of a State,” or what level of control such official must possess. There has been concern that lower-level commanders and officers may be swept into this definition, and that their decision making may be adversely affected if they believe they may be prosecuted by the Court.
- The definition makes it difficult to determine what type of military action rises to the level of a “manifest violation” of the U.N. Charter, and whether such a manifest violation can be found only when all three elements of “character, gravity, and scale” are first verified. Although there is a list of acts that would qualify as aggression, it is argued that the use of terms such as “however

¹⁸ For full text, see RC/Res. 6, Annex I, para. 2, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

temporary” to describe prohibited actions may include small incursions in the definition of prosecutable aggression.

- The definition is overbroad, possibly sweeping in uses of force to stop war crimes and other atrocities in a state, enforcement of the responsibility to protect in countries where atrocities are taking place, and self-defense under Article 51 of the U.N. Charter.

Ambassador Rapp has stated that a definition limiting certain uses of force to stop atrocities could weaken the core human rights mission of the ICC, by essentially preventing military and political forms of human rights protection.¹⁹ Other observers have disagreed with these criticisms, however, stating that the definition contains sufficient detail to properly describe actions that are prohibited, and that it will effectively limit prosecutions to only the highest ranking officials.

The U.S. delegation to the Review Conference concurred with many of the aforementioned concerns about and criticisms of the proposed definition. Given the definition’s overall consensus support from States Parties and other stakeholders, and the United States’ latecomer status in the process, the U.S. delegation accepted the definition’s language. But it also promoted an interpretation of the language that would add further detail to the definition and protect U.S. interests.²⁰ As an annex to the resolution that adopted the amendment adding the definition of aggression, the States Parties included a list of “understandings” that are meant to guide the Court in interpreting the provisions added. Two of these understandings are intended to maintain a certain threshold for acts that may give rise to an aggression prosecution:

- The sixth understanding provides that aggression applies only to the “most serious and dangerous form of the illegal use of force” and that an aggression determination depends on “all the circumstances of each particular case.” This language seems to be directed at minimizing the possibility that uses of force considered necessary to stop atrocities committed against civilian populations could constitute acts that might be prosecuted as aggression.
- The seventh understanding explains that determining whether an act of aggression constitutes a manifest violation of the U.N. Charter requires that there be acts of a sufficient character, gravity, and scale together to create such a violation. “No one component can be significant enough to satisfy the manifest standard by itself.” This understanding addresses the concern that small incidents or incidents of short duration, most likely carried out through decisions of lower ranking officers, might otherwise be prosecuted for aggression under the adopted definition.

After the Conference, Legal Adviser Koh characterized these understandings as a suitable bulwark against prosecutions for low-level incidents, military activities undertaken to stop atrocities, and actions taken in self-defense.²¹

The States Parties also adopted elements of the crime of aggression in a separate annex to the aggression resolution; these elements further sharpened the adopted aggression definition in the

¹⁹ American Society of International Law, presentation of Harold Hongju Koh, legal adviser, Department of State at *U.S. Policy Toward the upcoming International Criminal Court Review Conference*, May 14, 2010, p. 7.

²⁰ See Harold Hongju Koh, legal adviser, U.S. Department of State, statement at the Review Conference of the International Criminal Court, June 4, 2010, <http://www.state.gov/s/l/releases/remarks/142665.htm>.

²¹ Harold Hongju Koh, legal adviser, U.S. Department of State, statement at a press conference on the outcomes of the ICC Review Conference, June 15, 2010, http://www.state.gov/s/wci/us_releases/remarks/143178.htm.

Statute and the application of such definition to individuals. The annex states, among other things, that there is no requirement that an accused individual legally determine whether an act constitutes a manifest violation of or that it is inconsistent with the U.N. Charter. The elements include the requirement that an accused individual was aware of the factual circumstances that established that a use of force is inconsistent with and manifestly violates the U.N. Charter.²²

Activation of Jurisdiction

Adoption of the new article activating the Court's jurisdiction over the crime of aggression was the most contentious and debated action taken at the Review Conference; negotiations were protracted and did not conclude until the Conference ended. The jurisdiction provision as proposed contained a number of alternative versions, with the final version to be worked out during the Conference. After contentious debate and numerous substantial revisions to the original proposals, the States Parties adopted new provisions to activate the ICC's jurisdiction over the crime of aggression.

The Conference participants debated two primary issues concerning the ICC's jurisdiction over aggression: whether a state must consent to the ICC's aggression jurisdiction over its nationals or territory, and whether and to what extent the U.N. Security Council should determine which aggression cases are heard by the Court.

Provision Activating Aggression Jurisdiction as Proposed

The provision proposed before the Review Conference began dealt primarily with the issue of where authority to initiate an aggression case before the Court would lie:

- with the Security Council only;
- with the Security Council and the ICC prosecutor; or
- with the Security Council and the prosecutor, subject to certain requirements and restrictions.

The proposed amendments contained two alternative versions of the jurisdiction activation provisions, each with a number of different options. In the first alternative, the provision stated that if the Security Council finds an act of aggression has occurred, the prosecutor may proceed with an investigation as to whether the act constitutes a crime of aggression; if the Security Council does not determine an act of aggression, the prosecutor may not initiate proceedings. Another option added that the prosecutor may initiate proceedings without a Security Council determination if the Security Council requests the prosecutor to conduct the investigation.

In the second alternative, the provision stated that prosecutor will notify the Security Council of a case of alleged aggression. The prosecutor is then authorized to initiate an investigation on his own if the Security Council does not make a determination whether or not an act of aggression has occurred in a certain case within six months of notification. Other options allowed the prosecutor to proceed with a case if he receives authorization from the ICC Pre-Trial Chamber, the U.N. General Assembly, or the International Court of Justice.

²² For full text, see RC/Res. 6, Annex II (elements of crimes amendments) and Annex III (understandings amendments), http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

Issue: State Consent to ICC Aggression Jurisdiction

Adding aggression to the list of crimes under the jurisdiction of the ICC necessitated a determination of the situations that would require a state's consent to such jurisdiction, based either on the nationality of the individuals accused of aggression, or the territory of the state on which the aggression crime took place. Prior to and during the Conference, States Parties and other stakeholders advanced opposing arguments on the issue. Many asserted that the Court's jurisdiction over the crime of aggression should only require the consent of the state that is the victim of an act of aggression, arguing that jurisdiction for the other three ICC crimes is determined in this fashion. They claimed that to require aggressor state consent for aggression cases would weaken the system of international justice that the ICC is tasked to apply, which recognizes universal jurisdiction for certain serious crimes.

Others, including the United States, countered that the crime of aggression pertains directly to a state's official decisions to take military or other aggressive action, made in a political context. These decisions, they argued, are therefore unlike war crimes, crimes against humanity, and genocide, which pertain to actions taken during conflict and do not require high-level official state action for prosecution and conviction. They contended that each state, whether party to the Rome Statute or not, should be afforded the right to refuse consent to ICC aggression prosecutions of its nationals in order to preserve established rights of sovereignty over such official decisions. In addition, Legal Adviser Koh has argued that because aggressor state consent is considered necessary by some international law experts for aggression cases that might be conducted in the national court systems of another country, such consent should also be required for ICC aggression cases.²³

The advent of ICC jurisdiction over aggression crimes has caused certain observers to warn against a possible proliferation of aggression cases in national courts through the ICC's principle of complementarity. Because crimes under the ICC's jurisdiction are universal jurisdiction crimes, any state may bring cases involving such crimes in their own national courts. Some have argued that if complementarity is applied to aggression cases, national courts of one state may seek to pass judgment on the official actions of another state, characterizing them as criminal aggression. Some states might bring such cases to trial for political reasons, these critics assert. If states believe their officials will be targeted for prosecution by other states' national court systems for politically motivated reasons, they might choose not to accept the ICC's or any other jurisdiction over the crime of aggression.

Issue: U.N. Security Council Role in ICC Aggression Cases

Some countries, led by the five permanent members of the U.N. Security Council (China, France, Russian Federation, United Kingdom, and United States), supported an activation provision that reserved jurisdiction determinations to the Security Council alone.²⁴ The majority of States Parties, most of which at any given time are not members of the Security Council, opposed a so-called "Security Council trigger" for ICC aggression cases. These countries include many of the non-aligned movement (NAM) group of countries, and developing countries generally, including many African nations.

²³ Harold Hongju Koh, legal adviser, U.S. Department of State, statement at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court, Mar. 23, 2010, <http://usun.state.gov/briefing/statements/2010/139000.htm>.

²⁴ The U.N. Security Council has five permanent members and 10 non-permanent members elected by the U.N. General Assembly to two-year terms. For further information, see <http://www.un.org/Docs/sc/>.

Many arguments for sole Security Council authority over ICC aggression jurisdiction relate to the current role of the Security Council in curtailing and responding to acts of aggression under established international practice. Because the Security Council is vested with determining threats to international peace and security under Article 39 of the U.N. Charter, including determining whether an act of aggression has occurred, some have argued that the Security Council should also exercise sole discretion to allow ICC aggression cases to proceed. Some countries have argued that any aggression jurisdiction provision that allows initiation of investigations of aggression crimes without Security Council sanction would by definition violate international law. Legal Adviser Koh, presenting the current U.S. view, has warned that if the ICC prosecutor or other ICC body independently determines an act of aggression has occurred as a part of the judicial process leading to an aggression prosecution, such a determination may conflict with the Security Council's aggression determination concerning the same set of facts, leading to confusion in the international community on the criteria applied to determine aggression under international law.²⁵

Many other countries and other stakeholders, however, state that the Security Council would in most cases be unwilling to take up deliberations to determine acts of aggression and to authorize ICC aggression investigations. They assert that even if allegations of possible cases of aggression were added to the Council's agenda, achieving the unanimity of the five permanent members to authorize aggression cases would be difficult, likely resulting in many deserving aggression cases never being investigated or prosecuted. In addition, some observers have disputed the assertion that the Security Council has the exclusive authority to determine an act of aggression, and that the U.N. Charter does not support such an exclusive role on aggression.

Opponents of sole Security Council authority to initiate ICC aggression cases or determine acts of aggression that might be prosecuted by the ICC also argue that such authority would damage the ICC's judicial independence; the ICC would be relying on an external political entity to determine its jurisdiction. In turn, they assert, this lack of independence could weaken the ICC as an institution, diminishing the effectiveness of the Court in prosecuting war crimes, crimes against humanity, and genocide, as well as aggression. Some have argued as well that any Security Council determination of an act of aggression prior to ICC prosecution would infringe on the Court's responsibility to determine an element of the crime of aggression, thereby prejudicing the ICC's work.

A number of arguments concerning the Security Council's role in determining ICC jurisdiction over aggression cases focus as well on the possible politicization of the crime of aggression under the Rome Statute. Some proponents of a "Security Council trigger" for ICC aggression jurisdiction argue that a finding of aggression is at heart a political determination, casting judgment on the political and military decision making of a state's officials and requiring a response from the Security Council, a political body. Because of its political nature, they maintain, the Security Council is best placed to determine whether aggression has occurred and whether any prosecutions for the crime of aggression should take place. Many opponents of such Security Council authority counter that it is precisely because the Security Council makes political determinations that it should not be involved in the judicial determinations of the ICC, and that any jurisdictional requirement involving the Security Council would necessarily taint judicial proceedings with political decisions. Therefore, while the Security Council is tasked with determining the international political and military response to acts of aggression, these observers

²⁵ Harold Hongju Koh, legal adviser, U.S. Department of State, statement at the Resumed Eighth Session of the Assembly of States Parties of the International Criminal Court, Mar. 23, 2010, <http://usun.state.gov/briefing/statements/2010/139000.htm>.

have advocated the complete separation of the ICC's judicial process from the functions and decisions of the Security Council.

Provisions Activating Aggression Jurisdiction as Adopted

After contentious debate and several alterations to the originally proposed text, the States Parties at the Review Conference adopted two new articles for the Rome Statute, setting out the activation of the ICC's jurisdiction over the crime of aggression.²⁶ As will be explained in this section, these new provisions address the major concerns about state consent to aggression jurisdiction and Security Council authority over the ICC's exercise of such jurisdiction, and also contain provisions for delayed activation of aggression jurisdiction. The adopted provisions appear to represent major compromises and a strong desire to come to agreement on the part of the States Parties. For the United States, according to Legal Adviser Koh, the provisions, while not ideal, will provide the protections for U.S. servicemembers and officials that were desired by the U.S. delegation.²⁷

New Provisions for Initiation of Aggression Cases

As with the other three crimes within ICC jurisdiction, aggression cases under the new provisions may be initiated by the following methods:

- **A State Party may refer the case to the Court.** If a State Party refers an act of aggression to the ICC, it must involve officials of a State Party and must have taken place in the territory of a State Party. If an aggressor State Party has opted out of aggression jurisdiction (as explained below), however, no aggression case can be initiated.
- **The ICC prosecutor may initiate aggression proceedings.** If the ICC prosecutor determines that an aggression case should proceed, a number of conditions and restrictions apply:
 - First, like State Party referrals, if the case involves a non-party state's nationals or territory, or involves nationals of a State Party that has opted out of aggression jurisdiction (as explained below), the case cannot proceed.
 - Second, the ICC prosecutor must ascertain whether the Security Council has determined that an act of aggression has occurred:
 - If the Security Council has made such a determination, the prosecutor may proceed with an aggression investigation. The adopted provision states that an outside entity such as the Security Council may not prejudice the independent judgment of the ICC in determining whether an act of aggression has occurred.
 - If the Security Council makes no determination on whether an act of aggression has occurred, within six months of a notification by the prosecutor, the prosecutor may proceed with an investigation if the ICC's Pre-Trial Division authorizes commencement of such investigation.

²⁶ For full text, see RC/Res. 6, Annex I, paras. 3 & 4, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

²⁷ Harold Hongju Koh, legal adviser, U.S. Department of State, statement at a press conference on the outcomes of the ICC Review Conference, June 15, 2010, http://www.state.gov/s/wci/us_releases/remarks/143178.htm.

- **The Security Council may refer an aggression case.** In the case of a Security Council referral, the Security Council may refer officials of any state for acts of aggression in any state, whether either pertinent state is party to the Rome Statute or not, and whether an involved State Party has accepted ICC aggression jurisdiction or not.

For all aggression cases, the Security Council retains the authority to defer commencement of aggression cases for one year under Article 16 of the Rome Statute, and can renew such deferment on an annual basis. The new provision thus reserves to the Security Council overriding, albeit limited, authority to prevent aggression cases going forward.

Delayed Implementation and Prospective Application to Aggression Crimes

Although the States Parties adopted the jurisdiction activation provisions for aggression during the Review Conference, they delayed the exercise of this jurisdiction. According to the new provisions, the ICC may not exercise jurisdiction over the crime of aggression until two-thirds of States Parties agree to such authority in “a decision to be taken after 1 January 2017.” Thus, similar to the Rome Statute including aggression originally but delaying consideration of its definition and the ICC’s jurisdiction over the crime, the aggression jurisdiction amendments as adopted at the Review Conference set out the Court’s jurisdiction but delay its exercise. In addition, the Court may exercise jurisdiction only over those aggression crimes committed at least one year after the date that 30 States Parties have ratified or accepted the amendments activating jurisdiction over aggression. Pursuant to the understandings accompanying the aggression jurisdiction amendments and adopted by the States Parties, these two timing provisions read together allow the ICC to exercise jurisdiction only with respect to aggression crimes committed after the adoption of the amendments (on or after January 1, 2017) and after 30 States Parties accept the amendments, whichever is later.

Jurisdiction Over Non-Party States and State Party Opt-Out Provisions

The States Parties adopted jurisdiction activation provisions that allow states to be exempt from ICC aggression jurisdiction for situations referred to the Court by States Parties or requests from the ICC Prosecutor to investigate situations.²⁸ In these instances, the ICC cannot exercise jurisdiction in aggression cases involving the nationals or territory of states that are not States Parties of the Rome Statute. Also, if a State Party has previously declared that it does not accept the ICC’s aggression jurisdiction, the Court may not initiate proceedings concerning an alleged aggression violation by that State Party’s nationals or on that Party’s territory. A State Party may make such a declaration prior to the expected 2017 activation of the ICC’s aggression jurisdiction by two-thirds of the States Parties.

Understandings Concerning Complementarity as Applied to Aggression

The Rome Statute obligates States Parties to prosecute individuals in their respective national justice systems for the three crimes originally activated under the Statute: war crimes, crimes against humanity, and genocide. This obligation, and the status of the ICC as a court of last resort for prosecuting atrocity crimes, is termed *complementarity*. Under complementarity principles, the ICC will only prosecute individuals for these three crimes when no state with relevant jurisdiction over a crime can or is willing to prosecute. At the Review Conference, the States

²⁸ As mentioned previously, U.N. Security Council referral grants ICC jurisdiction over nationals of any state regardless of their status as a Party to the Rome Statute or their acceptance of the Court’s aggression jurisdiction.

Parties adopted an understanding stating that the adoption of aggression jurisdiction does not create a right or obligation to prosecute individuals for aggression crimes under complementarity principles. This understanding addresses concerns about allowing countries to prosecute other countries' officials for state-sanctioned military and political decision making. Although understandings are not binding on States Parties, the fact that the States Parties adopted this understanding indicates general acceptance that aggression prosecutions and jurisprudence will be confined to the ICC; individual States Parties will not undertake such prosecutions. Some observers may assert that this understanding weakens the principle of universal jurisdiction of states to prosecute crimes associated with armed conflict under the Rome Statute, and unnecessarily creates different classes of crimes under the Statute.

U.S. Reaction to Aggression Jurisdiction Provisions as Adopted

U.S. officials who participated at the Review Conference have expressed general satisfaction with the aggression jurisdiction provisions adopted by the States Parties. Although the States Parties adopted provisions to make aggression operational under the Rome Statute, which the United States had originally wished to avoid, the United States as a non-party state cannot be subjected to ICC jurisdiction over cases initiated by State Party referral or the ICC prosecutor for aggression crimes that are allegedly committed on U.S. soil or by its nationals. The United States has veto power over any attempt to refer an aggression case through the U.N. Security Council. Thus, members of the U.S. Armed Forces or U.S. officials are not in danger of ICC aggression prosecution. Also, through action as a permanent member of the Security Council, the United States retains its ability to defer commencement of aggression cases on an annual basis under Article 16 of the Rome Statute.

In addition, because the ICC's exercise of jurisdiction over aggression has been delayed until 2017, U.S. officials have explained that the aggression provisions adopted may be opened to further debate. Ambassador Rapp and Legal Adviser Koh characterized the activation delay to 2017 as a "notional solution that can be reexamined" and a "non-final approach" to aggression, and has indicated that the United States will continue to engage through meetings of the ASP to improve the provisions on the definition of aggression and the ICC's aggression jurisdiction. Similarly, Ambassador Rapp called it a "deferral" of the aggression issue, and stated that the activation delay will allow the ICC to refocus on its core human rights mission, that is, on the original three ICC crimes.²⁹

Optional Seven-Year Exemption from Jurisdiction

Article 124 of the Rome Statute, which is titled "Transitional Provision," provides that a State Party, during its first seven years as a Party, can declare that it does not accept the jurisdiction of the Court, effectively exempting from prosecution war crimes, crimes against humanity, and genocide committed by its nationals or on its territory for that time period. The provision also requires that the first Review Conference examine this Article's provisions. When the Rome Statute was originally finalized, contentious debate surrounded Article 124, because many saw it as potentially gutting the ability of the Court to effectively prosecute international crimes during its first several years. It was included to encourage certain states that were undecided about the Court to become Parties to the Rome Statute.

²⁹ For both Legal Adviser Koh's and Ambassador Rapp's comments, see press conference on the outcomes of the ICC Review Conference, June 15, 2010, http://www.state.gov/s/wci/us_releases/remarks/143178.htm.

In the Review Conference agenda, the ASP included a proposal to delete Article 124 entirely. Supporters of this proposal argued the provision was meant to be “transitional” in nature, providing assurances to States Parties as the ICC began operations in 2002, and that it was no longer needed. The fact that Article 124’s own language requires a review under Article 123, paragraph 1, which specifically relates to changes in the Rome Statute, seemed to support this view. Also, only two States Parties, France and Venezuela, availed themselves of the exemption, while numerous other States Parties have engaged in armed conflicts without finding an exemption declaration necessary. France withdrew its declaration prior to the end of the seven-year period, and Venezuela’s seven-year exemption has expired. Proponents of deleting Article 124 argued further that removing an exemption option would reflect the ICC’s growth as an entity and its importance under international law. Although there seemed to be wide support for this proposal, some argued that maintaining the exemption provided in Article 124 would encourage more states to become party to the Rome Statute, acting as an assurance to countries even if they do not find it necessary to activate their exemption rights. Although it might harm the cause of international criminal justice in the short term, they argued, it would increase the likelihood of eventual universal acceptance of the Court’s jurisdiction.

The States Parties chose not to amend the Rome Statute to delete Article 124, so the right of new parties to exempt themselves for seven years remains. Japan and the European Union (EU) both touted its significance for eventual universal acceptance of ICC jurisdiction, and Japan in particular argued that it would improve the chances that other countries in East Asia would become States Parties in coming years.

Employing Certain Weapons in Non-International Conflicts

The ASP included a resolution for consideration at the Review Conference to add employing certain types of weapons in non-international conflicts to the definition of war crimes under Article 8(2)(e) of the Rome Statute. The new provisions would outlaw the following actions:

- (xiii) Employing poison or poisoned weapons;
- (xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and
- (xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

Identical provisions are already included in Article 8(2)(b) of the Statute, which applies to international conflicts. At the Review Conference most States Parties and other stakeholders supported adoption of these additional prohibitions in Article 8. The United States, however, had expressed concerns about these provisions, both for their possible application to actions taken by domestic authorities within the United States and for U.S. Armed Forces activities in conflicts such as Afghanistan and Iraq that were non-international in character. Rosa Brooks, Senior Advisor to the Under Secretary of Defense for Policy, stated in May 2010 that the amendments might not take into account the necessity of using certain types of weapons both in counter-terrorism operations, as well as some domestic law enforcement and public security activities. She also suggested that the rules on employment of certain weapons can be better regulated under existing international treaties on the use of conventional weapons.³⁰ Proponents of the new

³⁰ American Society of International Law, statements of Rosa Brooks, Senior Advisor to the Under Secretary of

prohibitions argued that these prohibitions have already been established in international law through the custom and practice of the international community, and that their addition would reflect customary international law.

The States Parties adopted the new prohibitions for addition to Article 8(2)(e) at the Review Conference. In response, the U.S. as well as the Canadian and Israeli delegations supported a French delegation statement that interpreted the new prohibition concerning use of certain bullet types to prohibit their use only if there is a specific intent to aggravate suffering or wounding effect.³¹ Interpreting the provisions to require a finding of such intent would raise the threshold for finding a violation of the provisions.

Stocktaking of International Criminal Justice

During the Review Conference, the States Parties and other stakeholders convened a number of panel and roundtable discussions to take stock of the state of international criminal justice as undertaken by the ICC, and to discuss and determine strategies concerning the effects of the ICC's work and State Party involvement in that work. Four main stocktaking topics were covered:

- cooperation of States Parties with the ICC and other States Parties in bringing criminals to justice;
- the principle of complementarity under the Rome Statute and its role in fighting impunity for atrocity crimes;
- the effect of the Court on victims of international crimes and affected communities; and
- the relationship between achieving peace and effecting justice for criminal actions committed during armed conflict.

As a result of these discussions, States Parties adopted resolutions concerning victims of crimes and complementarity, as well as a declaration concerning cooperation. The States Parties did not adopt a resolution or declaration on the topic of peace and justice.

Generally, observers of the stocktaking exercise at the Review Conference have asserted that it was a productive undertaking, even though it did not concern the central judicial and investigative operations of the Court. Instead, it focused on States Parties' obligations under the Rome Statute and highlighted the need to consider the effects of the ICC on issues outside mere prosecutions. These issues are often intertwined with the political will and governmental capabilities of States Parties and other states both to accept the jurisdiction of the ICC and to cooperate with the Court on individual cases. Although State Party and observer delegations made official statements during the stocktaking sessions, some have commented that the meetings were made more useful by allowing subject-matter experts, rather than state representatives, to lead many of the discussions. This, they claim, led to a sharpened focus on concrete strategies and practical approaches to improvement of the ICC's effectiveness.

The U.S. delegation participated fully as an observer in the stocktaking exercise. In the period before the Review Conference took place, many observers promoted U.S. involvement in the

Defense for Policy, at *U.S. Policy Toward the upcoming International Criminal Court Review Conference*, May 14, 2010, pp. 10, 23.

³¹ See RC/11, *Review Conference of the Rome Statute of the International Criminal Court: Official Records*, Annex VI, statement B (France), p. 120.

stocktaking meetings due to the capacity of the United States to assist the ICC both through diplomatic support and a number of technical areas of international criminal justice where the United States has long experience. During the Conference, it has been reported that the U.S. delegation played a central role in the stocktaking sessions, and the United States reportedly was the only non-party state to make specific pledges of support to improve work in the four areas discussed. Ambassador Rapp has stated that despite the restrictions in ASPA on the use of U.S. funds to support the ICC, the United States has provided in-kind technical assistance to the ICC and will continue to do so on a case-by-case basis.³² Legal Adviser Koh has stated that such assistance does not require a change in U.S. law going forward.³³

Cooperation

Part IX of the Rome Statute contains a number of provisions creating obligations for States Parties to cooperate with the Court as it investigates and prosecutes the crimes under its jurisdiction. Part X contains provisions concerning the role of States Parties in enforcing sentences handed down by the ICC. States Parties are required under the Statute to

- cooperate with the Court in general and in response to specific ICC requests for information and assistance,
- arrest wanted individuals, and
- ensure that they maintain and enforce national laws and procedures that will permit full cooperation with the ICC.

During the Review Conference, the States Parties, observer states, and other stakeholders met to discuss the experiences of the ICC and States Parties with respect to cooperation.

At the stocktaking exercise on cooperation, a number of salient issues arose. One of the central concerns involved the execution of arrest warrants. In addition, participants cited problems with cooperation stemming from the lack of States Parties' national legislation allowing cooperation and the incompatibility of national criminal procedures and the ICC's procedures. Ad hoc voluntary agreements between individual States Parties and the ICC were suggested as workarounds for national law deficiencies, especially in such matters as transfers of arrested individuals; enforcement of sentences; and relocation of witnesses, victims, and acquitted individuals. Some discussed the need to ensure that defense teams for those accused of crimes before the ICC receive equal assistance as prosecution teams.

Participants also highlighted the importance of ICC and State Party assistance to other States Parties to build capacity and pass legislation enabling them to fully cooperate with the Court. Some argued that certain States Parties faced significant obstacles both in terms of their respective national justice systems' ability to cooperate with the ICC, and the possible internal political fallout from such cooperation. In addition, some stressed the inability of the ICC to punish non-cooperative States Parties or to encourage other States Parties to shame or bully other states into cooperating, and expressed the hope that the ASP would act to persuade States Parties to improve their cooperation in the future.

After these meetings, the States Parties adopted a declaration emphasizing the obligations States Parties have to cooperate with the Court, especially in

³² American Society of International Law, statement of Ambassador-at-Large for War Crimes Issues Stephen J. Rapp, at *U.S. Policy Toward the upcoming International Criminal Court Review Conference*, May 14, 2010, p. 13.

³³ Statement of Harold Hongju Koh, legal adviser, Department of State, at briefing on the International Criminal Court Conference in Kampala, Uganda, June 2, 2010, http://www.state.gov/s/wci/us_releases/remarks/142585.htm.

- executing arrest warrants and complying with requests from the ICC;
- encouraging States Parties to enter into voluntary cooperation agreements with the Court; and
- sharing lessons learned from prior ICC cooperation experience with other States Parties, among other things.³⁴

The States Parties also adopted a resolution to strengthen the enforcement of sentences handed down by the Court, calling on States Parties to indicate their willingness to receive sentenced individuals and recognizing that states generally may accept sentenced persons through cooperation with an international organization or mechanism.³⁵

Ambassador Rapp has stated that the United States can foster ICC cooperation generally through its experience working with the ad hoc international criminal tribunals in the former Yugoslavia, Rwanda, and Sierra Leone, including in the operational areas of enforcing warrants, information sharing, and protecting witnesses, and can give diplomatic support for ICC cooperation in its dealings with other countries. ICC officials have stressed the importance of U.S. cooperation with the Court, especially with regard to providing resources necessary to locate, arrest, and transport accused individuals for ICC prosecution. U.S. officials have expressed the United States' intent to assist current ICC investigations into atrocities allegedly committed in Kenya during its 2009 elections. Ambassador Rapp and Legal Adviser Koh have stated their desire to ascertain the status of States Parties' cooperation with the ICC on investigations in the Democratic Republic of the Congo, the Central African Republic, Sudan, and Uganda. Ambassador Rapp has explained that past U.S. cooperation with ad hoc international tribunals is now shifting to cooperation with the ICC, as the Court is expected to replace the ad hoc international tribunals going forward, and he has stated that the United States has "an abiding interest in seeing the Court successfully complete the prosecutions it has already begun."

Complementarity

The ICC was established as a judicial venue of last resort for war crimes, crimes against humanity, and genocide. Under the Rome Statute, States Parties are expected to arrest and prosecute those accused of these crimes, if their respective national courts have jurisdiction over such crimes. The ICC acts as a "complementary" judicial venue in case no State Party or non-party state can or is willing to exercise jurisdiction over any allegation of these types of crimes.

During the Review Conference, the States Parties and other stakeholders held a stocktaking meeting on the issue of complementarity, specifically focusing on the need for States Parties to improve their overall capacity to prosecute ICC atrocity crimes in their respective national judicial systems. This focus on improving the capacity of national judicial systems to undertake prosecutions for ICC crimes has been termed *positive complementarity*. Participants discussed the importance of assisting States Parties needing to improve their national systems to prosecute ICC crimes. They noted that while the ICC serves as a backstop for States Parties when they cannot prosecute ICC crimes, the ICC is not designed nor has the capacity or resources to prosecute any more than the highest-level perpetrators of such crimes. The ICC prosecutor's investigations have demonstrated the ICC's intent to prosecute only the highest-level individuals accused of ICC crimes. Without States Parties prosecuting the higher number of middle- and lower-level actors alleged to committed ICC crimes, they say, an "impunity gap" is created that frustrates the overall goals of international justice. A number of experts and State Party representatives suggested

³⁴ Declaration RC/Decl.2, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Decl.2-ENG.pdf.

³⁵ Resolution RC/Res.3, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.3-ENG.pdf.

approaches to improving national systems, including ensuring national criminal laws provide for prosecution of ICC crimes, and in some cases creating special national courts to prosecute alleged perpetrators of ICC crimes.

Participants also stressed the necessity of assisting States Parties to improve the capacity of their respective national systems. International organizations, especially the United Nations, it was explained, already provide such assistance, and States Parties, organized through the ASP, should do more to assist other States Parties. Although the ICC itself can aid States Parties through information sharing, some argued that the Court itself has limited resources and must concentrate primarily on its judicial work. The States Parties adopted a resolution on complementarity at the Review Conference that reiterated the primary role of States Parties to prosecute ICC crimes, expressed the need for additional measures to ensure that States Parties can prosecute ICC crimes, and called for greater international and state-to-state assistance to increase States Parties' ability to prosecute these crimes.³⁶ In addition, the resolution requests that the ASP Secretariat facilitate information sharing among the Court, States Parties, international organizations, and civil society to increase the capacity of the national judicial systems of States Parties.

Ambassador Rapp expressed U.S. support for the concept of positive complementarity, stating that the United States will aid the development of the capacity of other states' judicial systems to prosecute ICC crimes. This position is in general agreement with the U.S. government's position that war crimes and other atrocity crimes should be prosecuted by sovereign nations rather than international bodies when possible. According to U.S. officials, many U.S. rule-of-law programs and other programs to build judicial capacity already support positive complementarity principles for atrocity crimes. During the Review Conference, the United States stressed its major international role in judicial capacity building, co-sponsoring a program with Norway and the Democratic Republic of the Congo on efforts to improve the judicial capacity in that African country. The United States also pledged to continue aid to states for improvement of their national judicial systems. Some observers have argued that U.S. and other international assistance needs to include aid specifically to increase capacity to prosecute ICC crimes and share information with the ICC, and to aid passage of new national legislation for states that currently cannot effectively prosecute ICC crimes. Other have called for new funding for the ASP Secretariat to lead capacity building programs for States Parties needing assistance to achieve positive complementarity goals.

Impact on Victims and the Relationship Between Peace and Justice

Meetings were held during the Review Conference on the impact of the ICC on victims and affected communities and on the issue of the relationship of international justice to efforts to bring peace to societies affected by war. During the meetings on victims, attendees lauded the rights in the Rome Statute of victims to participate in ICC proceedings as more than just witnesses, and the ICC's role in "breaking the silence" of victims of atrocity crimes. Articles 68 and 75 of the Statute provide for participation of and reparations for victims of ICC crimes. Some argued, however, that efforts are needed to improve outreach to victims and affected communities, and to increase ICC field presence, to both inform them of their rights and the ICC's work and to manage victims' expectations for outcomes and possible reparations. Increasing intermediary involvement from NGOs and religious leaders was also recommended to better inform and involve victims in the ICC process. Some participants also proposed increasing assistance to victims for physical and psychological rehabilitation through the ICC's Trust Fund for Victims, created under Article 79 of the Rome Statute, which receives donations from States

³⁶ Resolution RC/Res.1, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf.

Parties on a voluntary basis. Concerning the Trust Fund generally, some participants argued that States Parties need to increase contributions, especially to fund measures to support women victims who often must continue to live in the same areas as the perpetrators of such crimes against women even after the crimes have occurred.

At the Conference's stocktaking meeting concerning peace and justice issues, some participants argued that the existence and activities of the ICC have contributed to the rejection of the concept that achieving peace and ensuring justice in armed conflicts are necessarily at odds with each other. It has long been suggested that attempting to arrest and prosecute leaders involved in armed conflict and alleged to have committed atrocity crimes will convince such leaders to refuse any political settlement and to continue conflicts indefinitely, because they expect to be incarcerated in prosecutions that may be politically motivated. Some claimed that the Court, while slow in its process, has sent a signal that impunity for atrocity crimes will no longer be tolerated and should no longer be used as a bargaining chip in peace negotiations. It was also claimed that the Court's pursuit of justice had in fact aided some peace processes by marginalizing individuals accused of crimes who were obstacles to political settlement. Failing to ensure justice for criminal acts, some argued, diminished the durability of peace settlements in certain situations, because animosity toward such perpetrators undermined societies' capacity to sustain political compromise between former warring groups. It was recognized that justice measures undertaken by the ICC may still need to be sequenced carefully to avoid undermining peace efforts, and that U.N. Security Council deferrals of prosecutions under Article 16 of the Rome Statute may be necessary. Participants also recognized that the ICC must be aided by national and local transitional justice measures and non-judicial initiatives in order to effectively strengthen lasting peace. Other attendees, however, reiterated concerns that ICC activities could delay peace settlements going forward.

The States Parties adopted a resolution at the Review Conference on the impact of the Rome Statute system on victims and affected communities, highlighting first the need for States Parties to preserve the rights and protections for victims provided in the Rome Statute through national legislation.³⁷ The resolution also calls on the Court to increase its accessibility to victims through better outreach and an augmented field presence. It encourages greater State Party funding for the Trust Fund for Victims and cooperation among States Parties, the ICC, and the Trust Fund Secretariat to coordinate promotion of the importance of Trust Fund activities. In addition, the resolution calls on national governments, communities, and civil society to act to sensitize societies to victims' rights, especially victims of sexual violence, and the importance of anti-stigmatization and reintegration programs for such victims. With regard to peace and justice, the States Parties did not adopt a resolution or declaration, but expressed the need to continue discussing and monitoring the issue in future ASP sessions.

Issues and Options for Congress

The outcomes of the Review Conference present a number of issues related to the authorities and operation of the ICC, and to the relationship between the ICC and the United States. The States Parties adopted changes to the Rome Statute that increased the Court's jurisdiction, most importantly by adding the crime of aggression to the ICC's list of prosecutable crimes. This occurred despite some objection, including that of United States. It seems clear, however, that the States Parties to the Rome Statute as a whole are heavily in favor of moving forward with expanding the ICC's role in international criminal justice, expanding the influence of international criminal justice generally. The decisions taken at Kampala seem to signify the States

³⁷ Resolution RC/Res.2, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.2-ENG.pdf.

Parties' continued expectation that the ICC will grow as an important tool in encouraging peaceful resolution of disputes and discouraging military and other leaders from engaging in unlawful military activities, both at the beginning of and during armed conflicts.

With regard to U.S. interests, the U.S. delegation to the Review Conference did not condemn the addition of aggression and other provisions to the Rome Statute. The provisions defining the Court's jurisdiction over the crime seem to exclude U.S. officials and members of the U.S. Armed Forces from prosecution for the crime of aggression, and U.S. delegation efforts to clarify the definition of aggression under the Rome Statute make it likely that only the most serious cases of aggressive military action might be subject to prosecution. With regard to U.S. officials and servicemembers possibly being subjected to ICC prosecution for war crimes, crimes against humanity, and genocide, however, the Review Conference did not alleviate these long-standing U.S. concerns, and the Obama Administration has repeatedly asserted that the United States will not seek to become a party to the ICC in the near future.³⁸

The Review Conference nevertheless showed that the United States is actively engaging with the ICC, and intends to participate fully with the ASP on major issues regarding the Rome Statute and the operations of the Court. The Obama Administration's official policy toward the ICC is one of engagement as an observer nation, with further participation to come during the periodic meetings of the ASP. U.S. officials at the Review Conference made pledges of in-kind support to the ICC regarding the Court's current cases and the ICC prosecutor's current investigations. Ambassador Rapp and Legal Adviser Koh expressed their desire to meet with the ICC prosecutor to determine what U.S. support can be provided. They have explained that their cooperative efforts comport with pertinent U.S. law and that they do not require, nor will the Administration request, amendments to such law, including ASPA.

Despite these assertions, Congress may decide to further examine the ICC and the U.S.-ICC relationship, both in terms of current and historic U.S. policy and as it relates to the restrictions and intent of ASPA. Congress might undertake some or all of the following.

- **Conduct hearings.** Congress might choose to gather further information on
 - U.S. engagement and cooperation efforts with the ICC, including the specific activities undertaken by respective executive agencies to cooperate with the ICC and the identified "in-kind" assistance to the ICC, including assistance that flows through international organizations such as the United Nations. Congress may also ask for an explanation of Administration policy and ICC cooperation as it relates to the intended restrictions on the U.S.-ICC relationship in ASPA;
 - the possibility of the United States becoming party to the Rome Statute in the wake of the adoption of the crime of aggression and the restrictions on intrastate use of certain asphyxiating gases and special ammunition; and
 - the implications for U.S. interests, especially the security of members of the U.S. Armed Forces, of the adoption of provisions to activate the Court's jurisdiction over the crime of aggression.
- **Require executive branch reports.** Congress might consider requiring the executive branch to report on a periodic basis on

³⁸ See, e.g., statements of Stephen J. Rapp, ambassador-at-large for war crimes issues, and Harold Hongju Koh, legal adviser, Department of State, at press conference on the outcomes of the ICC Review Conference, June 15, 2010, http://www.state.gov/s/wci/us_releases/remarks/143178.htm.

- U.S. cooperation with the ICC, including resources and personnel involved in such cooperation. As explained above, ASPA prohibits the use of appropriated funds to support the ICC, but the Obama Administration has pledged only “in-kind” assistance to the Court. Reporting on U.S. support for the ICC could shed light on whether U.S.-ICC cooperation activities fall within existing legislative authorities and restrictions, especially those in ASPA; and
- developments in the practices, procedure, and precedents of the ICC, as well as the statements of the ICC Prosecutor and other ICC officials, in relation to preparing for prosecuting the crime of aggression, as well as any ICC investigations into the actions of U.S. officials or officials of U.S. allies.
- **Amending existing or enact new legislation.** Because official U.S. policy toward the Court has shifted to one of engagement and support, Congress might provide direction to U.S. officials concerning the U.S.-ICC relationship going forward through new legislation, including provisions specifically dealing with the Review Conference’s adoption of the crime of aggression and other changes to the Rome Statute. Such legislation might provide new authorities for or limitations on U.S. involvement with the Court, and might address the definition of “in-kind assistance” and U.S. provision of it to the ICC. Congress might decide to take up legislation that would provide policy direction on U.S. support or opposition to ICC activities and to delineate authorization for U.S. participation in meetings of the ASP and other U.S.-ICC engagement.³⁹

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³⁹ Legislation was proposed in the 111th Congress dealing in part with these issues. The American Self-Defense Protection Act of 2010 (H.R. 5351; 111th Cong.), introduced by Rep. Ileana Ros-Lehtinen on May 20, 2010, contains a provision prohibiting the use of appropriated funds for U.S. participation at “any [ICC] review conference or meeting of the Assembly of States Parties.” It also provides a sense of Congress provision recommending that the President and Secretary of State lead diplomatic efforts to seek alternatives to the ICC and avoid any action that legitimizes the Court.

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